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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ANTONIO CRUZ APARICIO, Defendant and Appellant.	H045319 (Santa Clara County Super. Ct. No. C1643315)

Antonio Cruz Aparicio appeals a judgment entered following his no contest plea to multiple charges of lewd and lascivious acts on a child by force or fear (Pen. Code, § 288, subd. (b)(1))[1] and lewd and lascivious acts on a child under the age of 14 (§ 288, subd. (a)). He argues that the trial court violated his plea agreement when it failed to dismiss a remaining charge at his sentencing hearing. We modify the judgment to dismiss count 17 and affirm as modified.

I. STATEMENT OF THE CASE[2]

An amended complaint was filed on August 31, 2016, against Aparicio charging him with continuous sexual abuse of a child under the age of 14 (§ 288.5, subd. (a); count 1); sexual penetration of a child under the age of 14 by a defendant more than 10 years older (§ 289, subd. (j); count 2); lewd and lascivious acts on a child by force or

[1] All further statutory references are to the Penal Code.

[2] The underlying facts are omitted because they are not relevant to the issue on appeal.

fear (§ 288, subd. (b)(1)); counts 3, 4, 5, 6, 7, 8, 9, 10, 12, 13, 14, 15, 16, 17); and lewd and lascivious acts on a child under the age of 14 (§ 288, subd. (a); count 11).

On September 7, 2017, the district attorney orally amended the complaint to add charges of lewd and lascivious acts on a child under the age of 14 (§ 288, subd. (a); counts 18 and 19). Aparicio pleaded no contest to three counts of lewd and lascivious acts on a child by force or fear (§ 288, subd. (b)(1); counts 3, 4 and 5) and three counts of lewd and lascivious acts on a child under the age of 14 (§ 288, subd. (a); counts 11, 18, and 19) in exchange for an agreed upon prison term of 36 years.

Aparicio was sentenced on November 17, 2017. Prior to the hearing, Aparicio brought a motion pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 to substitute his appointed counsel. The court denied the motion following an in camera hearing. Thereafter Aparicio was sentenced to 36 years in state prison made up of the following: eight years on count 11 (§ 288, subd. (a)), consecutive terms of two years each on count 18 and 19 (§ 288, subd. (a)), and consecutive terms of eight years each on counts 3, 4, and 5 (§ 288, subd. (b)(1)). Orally on the record, the court dismissed counts 1, 2, 6, 7, 8, 9, 10, 12, 13, 14, 15, and 16; the court did not dismiss count 17, the only remaining count, and took no other action on it. The minute order from the hearing states: "Dismissal . . . rem cts and all alleg."

On November 20, 2017, Aparicio filed a notice of appeal on the grounds that his attorney rendered ineffective assistance of counsel and the trial court erred in denying his *Marsden* motion. The trial court issued a certificate of probable cause. Aparicio filed a second notice of appeal on December 14, 2017, based on sentencing error.

II. DISCUSSION

In the sole issue before us on appeal, Aparicio asserts that the trial court erred and violated his plea agreement when it failed to dismiss count 17 at the sentencing hearing. We agree. In reviewing a challenge involving a negotiated plea agreement, we apply the standard of review applicable to contracts generally. (*People v. Toscano* (2004)

124 Cal.App.4th 340, 344.) " '[T]he "interpretation of a contract is subject to de novo review where the interpretation does not turn on the credibility of extrinsic evidence." [Citations.]' [Citations.]" (*In re Ricardo C.* (2013) 220 Cal.App.4th 688, 696.)

The record indicates that the terms of the plea agreement were as follows: Aparicio would plead no contest to three counts of lewd and lascivious acts on a child by force or fear (§ 288, subd. (b)(1); counts 3, 4 and 5) and three counts of lewd and lascivious acts on a child under the age of 14 (§ 288, subd. (a); counts 11, 18, and 19) in exchange for a prison term of 36 years. There were no other specific conditions of the agreement stated on the record at the plea hearing on November 17, 2017, and no indication of the proposed disposition of the remaining counts of the amended complaint. The written advisement of rights, waiver and plea form that Aparicio completed when he entered his plea included a box that can be checked stating: "**If applicable**-As part of the plea agreement, I understand the other count(s), allegation(s), and/or enhancement(s) will be dismissed at the time of sentencing." (Emphasis in original.) Aparicio did not check this box.

The reporter's transcript of the sentencing hearing and the clerk's minute order are inconsistent. At the sentencing hearing, the trial court orally dismissed the remaining counts pending against Aparicio, listing them specifically on the record, but omitted count 17 from the list. The trial court took no further action on that count. The clerk's minute order, on the other hand, states: "Dismissal . . . rem cts and all alleg" [dismissal of all remaining counts and all allegations]. According to the clerk's minute order, count 17 should have been included as one of the dismissed counts.

When there is a discrepancy between the oral record and clerk's minute order, the general rule is that the oral record controls. (*People v. Gabriel* (2010) 189 Cal.App.4th 1070, 1073.) However, where a reasonable reading of the record demonstrates that the circumstance is that the trial court misspoke, or the court reporter was in error, the law does "not support such a mechanical rule." (*People v Smith* (1983) 33 Cal.3d 596, 599.)

" 'It may be said . . . as a general rule that when . . . the record is in conflict it will be harmonized if possible; but where this is not possible that part of the record will prevail, which, because of its origin and nature or otherwise, is entitled to greater credence [citation]. Therefore[,] whether the recitals in the clerk's minutes should prevail as against contrary statements in the reporter's transcript, must depend upon the circumstances of each particular case.' " (*Ibid.*, citing *In re Evans* (1945) 70 Cal.App.2d 213, 216.) "The erroneous statements in the reporter's transcript are of no effect. [Citation.]" (*People v. Thompson* (2009) 180 Cal.App.4th 974, 978.)

This rule has been applied on numerous occasions by this court. "When an irreconcilable conflict exists between the transcripts of the court reporter and the court clerk, the modern rule is not automatic deference to the reporter's transcript, but rather adoption of the transcript due more credence under all the surrounding circumstances. [Citations.]" (*People v. Rodriguez* (2013) 222 Cal.App.4th 578, 586; see also *People v. Pirali* (2013) 217 Cal.App.4th 1341, 1346.)

Here, the reasonable inference to be drawn from the totality of the record is that the trial court intended to dismiss all of the remaining counts at the sentencing hearing, but failed to articulate this in its oral pronouncement when dismissing the counts numerically on the record. There was no practical reason for declining to dismiss all of the remaining 13 counts following Aparicio's plea given the fact that the court imposed a 36-year prison commitment. It seems clear that the court misspoke at the sentencing hearing when it did not mention count 17 in the list of dismissed counts, particularly as it took no other action on that individual count and the prosecution did not request that any action be taken. A reasonable interpretation of the record compels us to conclude that the court's omission of count 17 in its dismissal order was an inadvertence. Under these circumstances, the clerk's minute order is a more accurate reflection of the court's intended sentence.

III. DISPOSITION

The judgment is modified to dismiss count 17. As modified, the judgment is affirmed.

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Greenwood, P.J.

WE CONCUR:

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Elia, J.

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Grover, J.

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